STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2003
v	No. 238631 Oakland Circuit Court
JOSEPH NGOUNE DJOUMESSI, Defendant-Appellant.	LC No. 2000-173893-FC

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

A jury convicted defendant Joseph Djoumessi of third-degree criminal sexual conduct,[1] and third-degree child abuse.[2] The jury acquitted Djoumessi of conspiracy to commit kidnapping,[3] kidnapping,[4] two counts of first-degree criminal sexual conduct,[5] and one count of third-degree child abuse. The trial court sentenced Djoumessi to a prison term of nine to fifteen years for the criminal sexual conduct conviction, and a concurrent one-year jail term for the child abuse conviction. Djoumessi appeals as of right. We affirm.

I. Basic Facts And Procedural History

Djoumessi's convictions arise from allegations that he and his wife, codefendant Evelyn Djoumessi,[6] who are both from Cameroon in West Africa, enslaved and abused the teenage victim, who is also from Cameroon, for approximately three years in their Farmington Hills home. The victim alleged that, after moving in with Djoumessi, she was denied the opportunity

[1] MCL 750.520d(1)(a).

[2] MCL 750.136b(4).

[3] MCL 750.157a and MCL 750.349.

[4] MCL 750.349.

[5] MCL 750.520b.

[6] Evelyn Djoumessi was charged with conspiracy to kidnap, kidnapping, and two counts of third-degree child abuse. She and Djoumessi were tried jointly. The jury convicted Evelyn Djoumessi of one count of third-degree child abuse.

to attend school, beaten with a belt, and sexually assaulted. The victim maintained that she was threatened with being returned to Africa if she told anyone about the alleged mistreatment.

By 1996, the victim, who was born in October 1982, had completed the seventh grade in Africa, and could speak and read English. At some point, one of Djoumessi's relatives offered the victim's parents the opportunity to have the victim come to the United States for better educational opportunities. The victim and her father were apparently told that, in return for the victim performing light housework, she would be educated in the United States. Eventually, the victim was provided with a bogus birth certificate and passport, and Evelyn Djoumessi filled out an alien relative form indicating that the victim was her daughter.

In October 1996, the then fourteen-year-old victim flew to the United States, and was met at the airport by Djoumessi and his family. The victim was taken to Djoumessi's Farmington Hills home, where she resided in a bedroom in a finished basement. The victim testified that, over the next three years, she spent the majority of her time caring for Djoumessi's children, doing laundry, and cleaning the house. It was undisputed that the victim never attended school during her stay with Djoumessi.

The victim testified that, beginning in 1998, Djoumessi sexually assaulted her approximately five times. She testified that, during the summer of 1998, when she was fifteen years old, Djoumessi came home at approximately 3:00 a.m., and directed her to come into his room. The victim indicated that the Evelyn Djoumessi was at work. According to the victim, after going into the room, Djoumessi went into the bathroom and came out naked. Djoumessi directed her to take off her clothes, which she did, and Djoumessi then felt her breasts, kissed her, and penetrated her vagina with his penis. Djoumessi next directed her to perform fellatio on him, which she did, and he ejaculated. The victim testified that she believed that she "had to do what [Djoumessi] said," and that Djoumessi threatened to send her back to Africa if she told anyone about the acts.

The following morning, while she was in the bathroom and Evelyn Djoumessi was still at work, Djoumessi asked the victim to go into the basement for the purpose of repeating the sexual acts. Djoumessi came downstairs, touched her breasts, and penetrated her vagina with his penis. Djoumessi then warned her that if she told anyone, she would go to jail because she was in the United States under a bogus name, or be sent back to Africa. The victim testified that, on other occasions, Evelyn Djoumessi had also threatened to send her back to Africa.

The victim testified that, a few days later, she told Patrick Che, a Cameroon native and Evelyn Djoumessi's cousin with whom she had developed a friendship, what had occurred. At trial, Che corroborated the victim's claim that she called him, and indicated that she was crying and upset during their conversation. Che testified that, on the following morning, he called Djoumessi and asked him to come to his house. Che testified that, after Djoumessi arrived, he went outside because his fiancée was home and spoke to Djoumessi in his car. Che indicated that, after advising Djoumessi of the victim's allegations, he initially acted surprised but then admitted that he had sex with the victim. According to Che, Djoumessi said that he was drunk and that it would not happen again, and asked Che not to report him to the authorities

The victim testified that, in December 1998, when she was sixteen years old, Djoumessi again sexually assaulted her. She indicated that, at the time Djoumessi's family was in

California. According to the victim, as she was sitting on a couch, Djoumessi sat next to her and, when she tried to get up, he told her to sit on his lap. Djoumessi then told her to remove her shorts and put on a nightgown. After she went into the basement, Djoumessi came into the basement carrying a condom. Djoumessi then took off his pants and her underwear, put on the condom, and penetrated her vagina with his penis. After approximately five minutes, Djoumessi stopped and went upstairs. The victim testified that she again told Che about the assault. Che testified that he told the victim to shout and call the police if Djoumessi attempted to assault her again.

In addition to the alleged sexual assaults, the victim testified that Djoumessi beat her with a belt on several occasions. She indicated that, in December 1998, she had failed to change the bed sheets, make breakfast, and turn off the Christmas lights. Because of her failures, Djoumessi struck her repeatedly with a belt, which left scars on her knee and one of her fingers. The victim also testified that, in January 1999, Djoumessi again severely beat her with a belt, leaving a scar on her arm and other injuries, after she called Che's fiancée in contravention of Djoumessi's orders not to talk to her. The victim testified that she told Che about the beatings, and Che testified that he thereafter spoke to Djoumessi. According to Che, Djoumessi admitted that he had lost his temper and beat the victim. Che also testified that Djoumessi twice declined his invitation to have the victim live with him.

The victim testified that in late 1999 she confided in one of Djoumessi's neighbors, who ultimately contacted the Family Independence Agency and reported concerns of neglect and abuse. The victim was thereafter removed from Djoumessi's home and placed in foster care.

At trial, Djoumessi denied any wrongdoing. He admitted that the victim did not attend school, and that he "smacked" the victim with his hand on one occasion. He denied that the victim was brought to the United States to care for his children, and denied that he ever sexually assaulted the victim, beat her with a belt, or threatened to send her back to Africa. He also denied ever having a conversation with Che, or admitting any wrongdoing to him. Djoumessi maintained that he treated the victim like a daughter and only wanted to provide her with a better life.

II. Juror misconduct

A. Motion for New Trial

Djoumessi argues that he was denied a fair and impartial trial because, during voir dire, Juror 5 concealed facts from the court that, had they been revealed, would have led defense counsel to challenge her for cause. According to defense counsel's post-verdict discussion with some jurors, Juror 5 failed to answer truthfully when asked if she had been a victim of a crime or sexual assault. According to affidavits from three other jurors, Juror 5 disclosed during deliberations that she had been raped and abused by her former husband. The three jurors averred that Juror 5 repeatedly used these past experiences as a basis for arguing for guilty verdicts. The three jurors claimed that Juror 5 ultimately persuaded them and they agreed to return guilty verdicts on one count of third-degree criminal sexual conduct and third degree child abuse.

At an evidentiary hearing on remand from this Court, Juror 5 testified that she answered the voir dire questions truthfully because she had never been a victim of sexual assault or domestic violence. She further testified that, during deliberations, there were discussions about the victim's inability to recall specific dates and her failure to promptly report the alleged assaults. Juror 5 indicated that, when one juror expressed an opinion that those matters negatively affected the victim's credibility, she expressed her view that victims sometimes do not report events because of shame or embarrassment. In order to make her point, she discussed her own experiences involving a mutual shoving match that she had with her former husband and one occasion when he convinced her to have sex when she did not want to, and explained that she was too embarrassed to tell anyone about those events. Juror 5 testified that she may have "embellished" the two incidents to emphasize her opinion, but maintained that she never referred to herself as a victim of sexual assault or domestic violence. She also testified that she never claimed to have any personal experience that gave her special understanding of the victim. Finally, Juror 5 testified that she could be a fair and impartial juror.

A private investigator testified that he was contacted by Djoumessi's representatives and asked to investigate the possibility of juror misconduct. The investigator indicated that one of the former jurors had a chance meeting with Djoumessi's wife and complained to her about Juror 5. The investigator testified that he was specifically instructed to contact only the three jurors; he was not requested to contact the others jurors, including Juror 5. After meetings with the jurors, the private investigator asked them to sign affidavits prepared by the defense.

The three jurors testified on Djoumessi's behalf. Each juror testified that, during deliberations, Juror 5 said that she had been raped and abused by her former husband. The three jurors also testified that they were approached by a private investigator, and asked to sign affidavits.

Following the evidentiary hearing, the trial court found that there was "no objective evidence" presented to support the three jurors' assertions that Juror 5 had been raped or was a victim of domestic violence, and that the facts as described by Juror 5 did not support such a conclusion. It also found that the three "disgruntled" jurors lacked credibility. With regard to the affidavits prepared by the three jurors, the trial court observed:

> As each juror was specifically questioned during the evidentiary hearing regarding his or her respective Affidavit, it became obvious to this Court that the Affidavits were substantially similar, that the jurors were unfamiliar with some of the language contained in the Affidavits, and [sic] did not understand the meaning of some of the language contained in the Affidavits, and did not understand the meaning of some of the words used. Also, certain facts reported in the Affidavits were disputed by the testimony of the affiants . . . Each Affiant included language that the prosecution failed to prove its case against Defendant, yet each juror admitted they returned a guilty verdict on some of the counts against Defendant. The Affidavits were prepared by Defendant appellant's counsel, according to the investigator.

The trial court concluded that Djoumessi failed to carry his burden of proving that Juror 5 wilfully failed to disclose material information that would make her unqualified to sit as a fair

and impartial juror and that the testimony presented at the hearing did not reveal any grounds to excuse her for cause. The trial court denied Djoumessi's motion for a new trial.

B. Standard of Review

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion.[7] An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.[8] To justify a new trial on the basis of juror misconduct, the defendant must show actual prejudice resulting from the presence of the juror, or that the juror was excusable for cause.[9] Jurors are presumptively competent and impartial and the party alleging the disqualification bears the burden of proving its existence.[10]

Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room.[11] Once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict.[12] An exception exists where juror misconduct can be demonstrated with evidence that the jury was exposed to outside or extraneous influences, such as undue influence by outside parties.[13] But juror misconduct "cannot be demonstrated with evidence indicating matters that inhere in the verdict, such as juror thought processes and interjuror inducements."[14] A defendant must also show that the extraneous influences "created a real and substantial possibility that they could have affected the jury's verdict."[15]

C. The Showing On The Record

Contrary to Djoumessi's claim, the record does not demonstrate that Juror 5 was excusable for cause or that Djoumessi was actually prejudiced by that juror's presence on the jury. The only question that Juror 5 is alleged to have answered falsely concerned whether she had ever been the victim of a crime or sexual assault. Although jurors have a duty to reveal relevant information,[16] here, Djoumessi failed to prove that Juror 5 knowingly concealed, misled

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[7] *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

[8] *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

[9] *Crear*, *supra*; *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998).

[10] *People v Johnson***,** 245 Mich App 243, 256; 631 NW2d 1 (2001).

[11] *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997).

[12] *Id*. See also *Consumers Power Co v Allegan State Bank*, 388 Mich 568, 573; 202 NW2d 295 (1972) and *Hoffman v Monroe Public Schools*, 96 Mich App 256, 261; 292 NW2d 542 (1980).

[13] *Budzyn*, *supra* at 88, 91; *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997); *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 293; 494 NW2d 811 (1992).

[14] *Messenger*, *supra*.

[15] *Budzyn*, *supra* at 89.

[16] *People v DeHaven*, 321 Mich 327, 334; 32 NW2d 468 (1948).

or gave false information during voir dire. The only factual support in the record for Djoumessi's claim is the affidavits and testimony offered by the three jurors. But, despite the three jurors' assertions, the trial court concluded that the three jurors were not credible, and that there was no evidence that Juror 5 was unfit to serve on defendant's jury. This Court will defer to the trial court's "superior ability to judge the credibility of witnesses."[17]

Furthermore, having examined the facts and the trial court's findings, we agree with the trial court that it is conspicuous that the private investigator was directed not to contact any of the other jurors, including Juror 5. In addition, there was testimony at the evidentiary hearing that, during deliberations, the jury was divided into two segments, and that the three jurors who were contacted and testified were part of the same group. One of the three jurors testified that the three jurors had "second thoughts" about the verdicts. With this in mind, we conclude that because Djoumessi has failed to meet his burden of establishing that Juror 5 concealed material facts or was unfairly biased against him, he is not entitled to any relief on this basis.

We also reject Djoumessi's claim that the jury was improperly subjected to extraneous influences by Juror 5's discussion, during deliberations, of being a victim of sexual assault and domestic violence. Initially, we again note that there was no finding that Juror 5 was a victim of domestic violence or a sexual assault, so the basic premise of Djoumessi's argument fails. Also, Djoumessi has failed to show that Juror 5's discussion, during deliberations, of her past experiences with her former husband, albeit embellished, constituted an impermissible extraneous or outside influence that affected the verdict.

Indeed, during deliberations, jurors may only consider the evidence that is presented to them in open court.[18] But the information provided by Juror 5, concerning her past experiences in order to explain why she believed the victim may have not timely reported the alleged assault, does not constitute an impermissible outside or extraneous influence, but rather represents the juror's normal expressions of personal opinion or thought processes. A review of the jury instructions reveal that the jury was instructed to "use [their] own common sense and general knowledge in weighing and judging the evidence, but [] should not use any personal knowledge you may have about a place, person, or event."[19] Here, Juror 5 brought her own personal experiences to bear in the deliberations on the case. This is not a case where the information brought into the jury room related facts about why this particular victim did not come forward, nor did it relate any prejudicial information about the defendant. It was merely evidence of one juror's mental processes as to why the victim in this case might not have come forward earlier. Even if the juror's expression of her personal opinions and analysis could be deemed inappropriate, errors caused by a jury's faulty reasoning are inherent in the verdict and cannot be

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[17] *People v Bender*, 208 Mich App 221, 227; 527 NW2d 66 (1994).

[18] *Budzyn*, *supra* at 88.

[19] See CJI2d 3.5(9).

challenged.[20] This Court "will not reward counsel's postdischarge inquiries regarding the internal thought processes of the jurors."[21] [22]

Further, there is no indication that the events involving Juror 5 and her former husband affected her impartiality or disqualified her from exercising the powers of reason and judgment. Juror 5 stated that she could be fair, and take seriously the prosecutor's burden of proof beyond a reasonable doubt. All of the jurors promised to follow the law as instructed by the trial court and, before deliberations, the court reminded the jury that it took an oath to decide the case based only on the properly admitted evidence and the law as instructed by the court. Juries are presumed to follow their instructions.[23] Because defendant has not demonstrated that the jury's verdict was improperly influenced by an outside or extraneous influence, he is not entitled to appellate relief on this basis.

III. Jury Instructions

A. Standard of Review

This Court reviews de novo claims of instructional error.[24] Jury instructions must be read in their entirety to determine if there is an error that requires reversal.[25] Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights.[26] "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court."[27] The failure to give a requested instruction is error requiring reversal only if the requested instruction is substantially correct, was not substantially covered in the charge given to the jury, and concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense.[28]

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[20] *Hoffman v Spartan Stores, Inc, supra* at 294-295.

[21] *Id.* at 291.

[22] As this Court observed in *Hoffman v Spartan Stores, Inc*,

> [t]he havoc and potential for abuse would be immense if we were to allow counsel to open the jury room door after the jury has been discharged and examine, analyze, and impeach the internal thought processes of the jury. [*Id*. at 291.]

[23] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[24] *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

[25] *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

[26] *Id*.

[27] *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

[28] *People v Moldenhauer*, 210 Mich App 158, 160; 533 NW2d 9 (1995).

B. Modified Version of CJI2d 5.13 - Agreements in Exchange for Testimony

Patrick Che was given immunity from prosecution for any testimony he provided concerning the case. At trial, Djoumessi requested that the trial court give the jury a modified version of CJI2d 5.13,[29] regarding Che's immunity agreement, which the trial court denied.

It is undisputed that the standard version of CJI2d 5.13 does not apply to the facts of this case. There was no evidence that Che testified in exchange for an agreement not to prosecute. It is undisputed that there were never any charges brought against Che. Recognizing this, the defense asserted that CJI2d 5.13 should be modified to refer to "potential" or "possible" charges. But even if Djoumessi's proposed modified version of CJI2d 5.13 could have been given to comport with the facts of this case, we are satisfied that he was not prejudiced by the absence of such an instruction. The trial court's general instructions on witness credibility were sufficient to adequately guide the jury in assessing the credibility of Che's testimony. For example, the jurors were instructed that it was their job to assess witness credibility, and in doing so, they should consider if the witness has any bias, prejudice, or personal interest in the case, if there have been any promises, threats, or other influences that may have affected how the witness testified, and if the witness had any special reason to be untruthful. The immunity agreement was addressed extensively during trial and the defense aggressively and plainly asserted that the immunity agreement between Che and the prosecution influenced Che's testimony. Accordingly, we conclude that this issue does not warrant reversal.

C. Departure from CJI2d 3.12 - the "Deadlocked Jury" Instruction

We also reject Djoumessi's claim that the trial court forced the jurors into rendering a guilty or not guilty verdict when it gave a deadlocked jury instruction that substantially departed from the standard jury instruction. Whether a trial court improperly foreclosed jurors from not reaching a verdict depends on the coercive nature of the instructions given.[30] Similarly, "whether any deviation from ABA standard [deadlocked jury instruction[31]] is substantial in the sense that reversal is required depends on whether the deviation renders the instruction unfair because it might have been unduly coercive."[32] The instructions must not have caused a juror to abandon his or her conscientious opinion and defer to the decision of the majority solely for the

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[29] CJI2d 5.13 provides:

> (1) You have heard testimony that a witness, [*name witness*], made an agreement with the prosecutor about charges against [him / her] in exchange for [his / her] testimony in this trial. You have also heard evidence that [*name witness*] faced a possible penalty of [*state maximum possible penalty*] as a result of those charges.
>
> (2) You are to consider this evidence only as it relates to [*name witness*]'s credibility and as it may tend to show [*name witness*]'s bias or self-interest.

[30] *People v Pollick*, 448 Mich 376, 384; 531 NW2d 159 (1995).

[31] The ABA's model instruction, as adapted for a deadlocked jury, is incorporated in CJI2d 3.12.

[32] *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984).

sake of reaching a unanimous verdict.[33] "Where additional language contains 'no pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that it constituted coercion,' . . . that additional language rarely would constitute a substantial departure."[34] Another relevant factor in determining if an instruction was coercive "is whether the trial court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals."[35]

Here, after the jury reported that it was unable to reach a verdict, the trial court instructed the jury as follows:

> You have returned from deliberations indicating that you believe you cannot reach a verdict. Please keep in mind, as stated previously on the record, there are 11 independent verdicts to be deliberated. I'm going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict on each of the 11.
>
> As you deliberate please keep in mind the guidelines that I have given you earlier. Remember it is your duty to consult with your other jurors and try to reach agreement if you can do so without violating your own judgment. To return a verdict you must all agree, and the verdict must represent the judgment of each of you.
>
> As you deliberate you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness. Naturally there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out jurors can often reach agreement.
>
> When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong. However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.
>
> *Now we have reached the noon hour. This instruction that I have just given [to] you will also be given to you in the jury room. You will be recessing for lunch and I ask that you return, it's a quarter to one now so I ask that you return at a quarter to two, you need at least an hour, in the jury room.*
>
> *Now I know some of you have some additional questions and I know that there's someone, what's going on on Saturday. So be mindful that the Court is*

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[33] *Id*. at 314; *Pollick, supra*.

[34] *Hardin, supra* at 315, quoting *People v Holmes*, 132 Mich App 730, 749; 349 NW2d 230 (1984); see also *People v Federico*, 146 Mich App 776, 784; 381 NW2d 819 (1985).

[35] *Hardin, supra* at 316.

aware of all your concerns but this is the final instruction that I'm giving you. Have patience. Do your job and everything will work out fine.

So again I tell you to go into the jury room, deliberate this matter and bring back a true and just verdict on each of the 11 independent verdicts to be deliberated by you. That's is [sic]. [Emphasis supplied].

Viewed in their entirety, the trial court's instructions were not a substantial departure from the standard deadlocked instruction, nor were they coercive. The Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court.[36] But in order to avoid the possibility of reversal, trial courts are directed to give the standard instruction, CJI2d 3.12, to deadlocked juries.[37] Here, the first four paragraphs of the trial court's instructions were virtually identical to CJI2d 3.12 of the standard jury instructions.[38] Although the trial court added some language, the instructions given properly reflected the applicable law, including that the jury's verdict must be unanimous, and that each juror should vote his or her conscience and not give up his or her honest opinions for the sake of reaching a unanimous verdict.[39] Moreover, the additional language contained no pressure, threats, embarrassing assertions, or other wording that would constitute coercion, and the trial court did not require, or threaten to require, the jury to deliberate for an unreasonable length of time or at unreasonable intervals. Rather, even with

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[36] *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

[37] See *Pollick*, *supra* at 382 n 12; *People v Larry*, 162 Mich App 142, 149; 412 NW2d 674 (1987).

[38] CJI2d 3.12 provides:

> (1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.
>
> (2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.
>
> (3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.
>
> (4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.
>
> (5) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.
>
> (6) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

[39] See *People v Burden*, 395 Mich 462, 468-469; 236 NW2d 505 (1975).

the additional language, the "overall impact of the instruction given in this case was not to coerce the jury, but to stress the need to engage in full-fledged deliberations while maintaining the integrity of the judicial system."[40] Because the challenged instructions were not unduly coercive and adequately protected Djoumessi's rights, we conclude this issue does not warrant reversal.

D. CJI2d 3.9 - Specific Intent

Djoumessi argues that, because third-degree child abuse is a specific intent crime, the trial court erred by failing to sua sponte instruct the jury on specific intent in accordance with CJI2d 3.9. Because Djoumessi did not request the omitted instruction below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings.[41]

We initially note that, as Djoumessi acknowledges, the Michigan Supreme Court has stated that this Court's conclusion in *People v Sherman-Huffman*,[42] that third-degree child abuse is a specific intent crime, was dictum that was not binding on the trial court.[43] "[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum,"[44] which "lack[] the force of adjudication and is not binding under the principle of stare decisis."[45]

Like the Supreme Court, we need not determine if third-degree child abuse is a specific intent crime. We conclude that, even if third-degree child abuse is a specific intent crime, the instructional error that Djoumessi alleges was harmless because the trial court clearly instructed the jury on the intent necessary for third-degree child abuse.[46] Specifically, the trial court's instructions included all of the elements of third-degree child abuse, including the requirements that defendant must have "knowingly or intentionally caused physical harm to [the victim]," and that the prosecution must prove each element beyond a reasonable doubt. Moreover, CJI2d 3.9 should be given if intent is a disputed issue in the case, or if the jury expresses confusion regarding the intent required to convict.[47] Here, Djoumessi did not argue that he lacked the

[40] *Hardin*, *supra* at 315, quoting *People v Bookout*, 111 Mich App 399, 404; 314 NW2d 637 (1981).

[41] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[42] *People v Sherman-Huffman*, 241 Mich App 264; 615 NW2d 776 (2000).

[43] See *People v Sherman-Huffman*, 466 Mich 39, 40 n 2; 642 NW2d 339 (2002). In *Sherman-Huffman*, the Supreme Court granted leave to consider whether third-degree child abuse is a specific or general intent crime. But the Supreme Court determined that, regardless of whether the statute requires general or specific intent, there was sufficient evidence to sustain the defendant's conviction for third-degree child abuse. *Sherman-Huffman*, *supra* at 40.

[44] *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597; 374 NW2d 905 (1985)

[45] *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999).

[46] See CJI2d 17.21. The standard instruction provides that the elements of third-degree child abuse are: (1) the defendant had care or custody of or authority over the child when the abuse allegedly happened, (2) the defendant either knowingly or intentionally caused physical harm to the child, and (3) the child was at the time under the age of eighteen.

[47] *People v Beaudin*, 417 Mich 570, 575-576; 339 NW2d 461 (1983).

requisite intent to be convicted of third-degree child abuse, but denied that he ever beat the victim with a belt. Because intent was not in issue and there is no indication that the jury expressed confusion regarding the requisite intent, CJI2d 3.9 was not required. In sum, the trial court's instructions correctly stated the law, and did not permit the jury to convict defendant on a lesser standard of proof. Therefore, we conclude that Djoumessi has failed to demonstrate plain error.

E. Modified Version of CJI2d 17.24 - Parental Discipline

We also reject Djoumessi's claim that the trial court erred by refusing to give an extracted version of CJI2d 17.24. The instruction flows from MCL 750.136b(7), which indicates that the child abuse statute should not be construed to prohibit a parent from reasonably disciplining a child, including the reasonable use of force. CJI2d 17.24 provides:

> (1) It is not a crime to discipline a child. A parent [or guardian, or any person otherwise allowed by law or authorized by the parent or guardian] may use force to discipline a child. But this does not mean that any amount of force may be used. The law permits only such force as is reasonable.
>
> (2) The defendant is not required to prove that the acts alleged here were reasonable. The prosecutor must prove beyond a reasonable doubt that the force used was not reasonable as discipline.

Djoumessi sought to only include the first sentence of the instruction: "It is not a crime to discipline a child." But providing only the first line of CJI2d 17.24 would omit the required determination that the amount of force used to discipline a child be reasonable. See CJI2d 17.24(1). Moreover, there was no evidence that Djoumessi was the parent or *lawful* guardian of the victim, or otherwise authorized by the victim's parents to discipline the child by using force. Finally, as previously indicated, Djoumessi denied that he ever beat the victim with a belt, which was the act that formed the basis for the child abuse conviction. Because Djoumessi's proposed version of CJI2d 17.24 was inapplicable and not substantially accurate, we conclude that reversal is not warranted on this basis.

IV. Sentencing

A. Standard of Review

Djoumessi claims that he is entitled to resentencing because the trial court improperly scored offense variable ("OV") 12, OV 13, and OV 25. He argues that there was no evidence to support the scores, and that the court was under the misconception that it was bound by the pretrial scoring of the guidelines range. Because the offenses of which Djoumessi was convicted occurred before January 1, 1999, the judicial sentencing guidelines apply to this case.[48] Under the judicial guidelines, scoring errors cannot form the basis for appellate relief unless the factual

[48] MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).

predicate relied upon by the trial court is wholly unsupported by the evidence, is materially false, and there is a finding that the sentence is disproportionate.[49]

A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score.[50] A sentencing court may consider all record evidence before it when calculating the guidelines.[51] Scoring decisions for which there is any evidence in support will be upheld.[52]

B. Scoring of Offense Variables

At sentencing, Djoumessi challenged the assessment of fifty points for OV 12 (criminal sexual penetrations) on the basis that the jury found only one penetration, and acquitted him of the other alleged criminal sexual conduct. Contrary to Djoumessi's argument, a guidelines scoring decision need not be consistent with the jury verdict, but need only be supported by a preponderance of the evidence.[53] Because the standard of proof differs from that necessary for a criminal conviction, a fact can be established for the purpose of guidelines calculations even though it was not found for the purpose of conviction.[54] Here, the victim testified that vaginal penetration occurred on five separate occasions. This was sufficient to support a score of fifty points for OV 12.

We conclude that Djoumessi's challenges to the scoring of OV 13 and OV 25 are moot in light of our resolution of his challenge to OV 12. If an error occurs that does not affect the applicable guidelines' range, the error is harmless beyond a reasonable doubt.[55] Djoumessi had a total offense variable score of eighty-five, which is thirty-five points more than the fifty points necessary for placement in the highest level of offense severity (level IV). Djoumessi was assessed five points for OV 13 and fifteen points for OV 25. So even if zero points were scored for those variables, defendant would remain in Offense Severity Level IV, with a total offense variable score of sixty-five. Thus, we conclude that he is not entitled to resentencing.

C. Misconception of Law

We also reject Djoumessi's claim that his sentence is invalid because the trial court acted under a misconception of the law regarding its discretion in scoring the guidelines or deviating from the recommended sentence range. A sentence is invalid when it is based on a

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[49] *People v Cain*, 238 Mich App 95, 131; 605 NW2d 28 (1999).

[50] *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000).

[51] *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

[52] *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996).

[53] *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993).

[54] *Id.*; *Harris, supra*.

[55] *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

misconception of the law.[56] Here, although the guidelines discussion appears perplexing at times, the trail court impliedly recognized that it could alter the score assessed to a particular offense variable, or deviate from the recommended sentence range. For example, following a bench conference with the parties, the trial court stated that, even if it modified Djoumessi's score for OV 12 from fifty to twenty-five, the guidelines would remain the same. The trial court then stated that, having heard all of the arguments, it accepted the guidelines range of 60 to 120 months. In sum, we conclude that is Djoumessi is not entitled to resentencing.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey

[56] *People v Miles*, 454 Mich 90, 96; 559 Mich 299 (1997).